



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 427 OF 2013

BETWEEN

JOSHUA NZUKI CLAIMANT

VERSUS

STEEL MAKERS LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Asewe Advocate instructed by Otieno Asewe & Company Advocates for the Claimant

Mr. Alwenya Advocate instructed by M.L. Alwenya & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his Statement of Claim on 5th December 2013. He states he was employed by the Respondent Company as a Furnace Operator on casual terms, from 1976, to 1986 when he was taken in on regular basis. He was placed under compulsory leave on 24th June 2013. When he returned to work on 23rd August 2013, he was issued a letter of retirement. The effective date was given as 20th June 2013. He earned a basic salary of Kshs. 43,367 and house rent allowance of Kshs. 6,505 as of the date of retirement. He had been ailing before retirement from osteoarthritis. The General Manager of the Respondent, Mr. Johnson, had been pressing the Claimant to retire. The Claimant holds his forcible retirement amounted to unfair termination. He prays for:

- a. 1 month salary in lieu of notice at Kshs. 43,367.
- b. Gratuity for 12 years at 16 days' salary for every year completed in service at Kshs. 320,248.
- c. 12 months' salary in compensation for unfair termination at Kshs. 520,404.

Total..... Kshs. 884,019

d) Costs, Interest and any other suitable reliefs.

2. The Respondent filed its Statement of Response on 18th March 2014. It concedes to have employed the Claimant formally in 1989. It does not concede to having employed the Claimant on casual terms in 1976. He was issued a written notice of retirement of 2 months on 20th June 2013. The notice was from 24th June 2013, to lapse 24th August 2013. He was placed on leave for the notice period, and paid his full salary for the month of August 2013. He was retired on attaining the mandatory retirement age under the Company Policy, of 58 years. He was paid, and acknowledged receipt of his final dues. There was nothing unfair about being retired on attaining the mandatory retirement age. He is not entitled to any of the prayers sought.
3. The Claimant gave evidence, and closed his case, on the 26th June 2014. The Respondent's General Manager Mr. Johnson Samuel Vasant gave evidence for the Respondent on the 9th March 2015, bringing the hearing to a close. Parties confirmed the filing of their Closing Submissions on the 5th June 2015.
4. The Claimant testified he was engaged by the Respondent as a Casual Employee, in 1972. This arrangement was converted into regular employment in 1976. The Claimant was issued a letter of employment. He was based at Kikuyu Town initially. He was transferred to Mombasa in 1986. The work machines were not ready, and the Claimant was requested to hold. He was issued another letter of employment on 20th August 1986. He worked as a Fireman.
5. He was promoted to the position of Furnace In-Charge. He was not advised what the mandatory retirement age at the Respondent was. He was fit and able to work, at the time he was pushed by the Respondent into retirement. Even at the time of giving evidence, the Claimant informed the Court he was as fit as a fiddle.
6. He had been advised to go on leave, and would be called and given further instructions by the Respondent. After he had stayed at home for 1 week, the Work Manager called him and told him to go to the Labour Office, and collect his dues. He visited the Labour Office Mombasa, and was advised to seek assistance from the Labour Office at Kilifi instead. The Labour Officer Kilifi called the Respondent, and it was agreed the Claimant be paid his retirement benefits. The Claimant went back to the Office. The General Manager told him to write a retirement letter, or he would be retired without benefits. He declined to write the letter.
7. The Labour Officer visited the Respondent's Offices. He consulted the Personnel Officer, after which the Respondent issued the Claimant the retirement letter. The Claimant was paid a total of Kshs. 75,133. This was with regard to outstanding annual leave days from 2011 to 2013. He received nothing else.
8. He worked for the Respondent for over 40 years. The Respondent used to pay retiring Employees gratuity at the rate of 16 days' salary for every completed year of service.
9. Questioned by the Advocate for the Respondent, Mr. Nzuki testified he never took annual leave, from the year 2009. Leave Application Forms were filled by an Employee wishing to proceed on leave, and retained by the Employer.
10. He took 26 days of annual leave from 3rd May 2011 to 2nd June 2011. He also used to take short term leaves. He took 2 days in April 2011; 3 days in December 2011; and 4 days in February 2012. He had a balance of 19 leave days on retirement.
11. He was employed in Mombasa in 1986. Prior to this his Employer was a Company called Steel Rolling Mills Limited. The contract contained a termination clause. It provided for termination on notice of 1 month, or payment of 1 month salary in lieu of notice.
12. He was verbally advised to go home on 20th June 2013. He would be called later. He received the retirement letter on 24th August 2013. He signed it on 21st June 2013. He was instructed by the Respondent to sign the letter. He refused to write a retirement letter upon the demand of Johnson. He was

not sent on compulsory leave. He came to learn about leave when he received the retirement letter. He was not told he would be on terminal leave. He did not report to work from 20th June 2013 to 24th August 2013. He was paid his salary for this period.

13. He seeks gratuity because other Employees who were retired were paid. Gratuity was not provided for under the contract of employment. The Claimant was subscribed to the National Social Security Fund (N.S.S.F). He was 61 years in 2013. He did not know the retirement age at the Respondent. The Respondent would be right in its action, if the retirement age was 58 years. He should have been given sufficient notice of retirement. Johnson compelled him to retire. Redirected, the Claimant told the Court the short term leave days were given to him on compassionate grounds. The document titled 'Joshua Nzuki's Leave Balance' indicated he was owed 124 days on retirement. It was 5 months. He was given 2 months' notice.

14. Johnson Samuel Vasant testified the Claimant was employed by the Respondent in 1986, through a letter of employment. The Witness could not tell if the Claimant worked with any other Company associated with the Respondent. The Respondent came into being in 1985. The Claimant was employed at Nairobi.

15. He came to Mombasa while already in employment. He was a Fireman. He retired on 24th August 2013, while in the same section, albeit in the position of a Supervisor. He was considered as part of the Management. He was confirmed in employment in 1993. He retired on attaining the Respondent's retirement age of 58 years. He was not in good health and was already 60 years. He should have retired in 2011, having been born in 1953. He requested for extension of his service period, claiming he had several family obligations. In 2012, he had been given 96 days of sick leave with full pay. He was unable to discharge his role.

16. Johnson requested Nzuki to resign. The Claimant became intransigent. He said he would not resign. He was paid whatever dues were owed him. He was given 2 months' notice of retirement. He was given 2 months' leave to be utilized in the notice period. He accepted the letter of retirement in June 2013, by appending his signature. His retirement was fair. He was not a Member of the Trade Union, to be entitled to gratuity. He left the Union voluntarily. He was not covered in the CBA concluded between the Respondent and the relevant Trade Union. His pay slip did not show any trade union dues made. He was paid a net total of Kshs. 75,132 in terminal benefits, acknowledged payment, and discharged the Respondent.

17. On cross-examination Johnson testified the Respondent paid annual leave for the period between 2011 and 2013. There were 72 days. It is not true he accumulated these days because he had a lot of work to do at the Respondent. There was no Policy Document showing retirement age at 58 years. It was not in the contract. The Claimant was a Supervisor. He was in Management. The Witness did not have Claimant's letter of promotion. There are no documents showing the Claimant was ailing. He was limping. Johnson referred the Claimant to the Labour Office Kilifi. He was not coerced into resigning. He was to retire in 2011. His letter of retirement was not backdated to June 2013. He acknowledged receipt in June 2013. He was granted more than 6 months before retirement, to explain his position. He was not coerced to leave the Trade Union. He left the Union in writing. He had hip replacement, which affected his movement. Clause 9 of the contract allowed the Respondent to terminate the contract on medical grounds. Retirement however, was regularly done. The Retirement Policy applied to all the Employees.

The Court Finds:-

18. It is accepted the Claimant was employed by the Respondent Company through the Employment Letter dated 18th August 1986. Whether he worked previously as a Casual Employee from 1976, for the Respondent or other Companies associated with the Respondent, appears to the Court to be irrelevant to the Claim. The Claimant's evidence that he was first employed in 1972, did not even match with his Statement of Claim that he first worked in 1976. His evidence on his date of employment was jumbled. The prayers sought are not hinged on the years of service from 1972, 1976, or 1986, to the date of retirement in June 2013. Indeed the only prayer which would necessitate focus on the number of years

served, is the prayer for gratuity. This prayer is based on 12 years, which would place commencement of employment in the year 2001.

19. The prayer for gratuity must at the outset be rejected. Firstly as observed above, the years of service are given as 12 years. There was no evidence establishing that the Claimant served for 12 years. Secondly the claim is based on 16 days' salary for every completed year of service. The Claimant testified this was the rate adopted by the Respondent with regard to other retiring Employees. There was no evidence on this rate either from other retired Employees, or employment records. Thirdly, the item is not given in the Claimant's contract. The Claimant did not bring to the attention of the Court any other document, such as a Collective Agreement which applied to him, granting him gratuity on retirement. There was no law or wage instrument cited, granting to the Claimant gratuity. Fourthly, he testified and the Respondent similarly testified that the Claimant had left the Trade Union as of the date he left employment. There was no likelihood he was covered under any CBA offering gratuity. He neither paid trade union dues, nor had agency fees deducted from his pay, to continue benefiting from any Collective Agreement. Fifthly, he was shown to be subscribed to the National Social Security Fund, and would not be eligible for additional social security payment under Section 35[6] of the Employment Act. ***From the outset, the prayer for gratuity is declined.***

20. There is adequate evidence that the Claimant was notified he would be retired, effective 24th August 2013. He was issued the retirement notice dated 20th June 2013, and advised to proceed on gardening leave, from 24th June 2014 to the end of the notice period, 23rd August 2013. He complied, and there is no basis to ask for notice pay of 1 month. ***The prayer for notice pay is rejected.***

21. His remaining prayer is on compensation for unfair termination. The Respondent testified the Claimant was retired under the mandatory retirement age of 58 years. He was 60 years on the date of retirement. At the same time, the notice of retirement alleged the Claimant did not have the physical fitness level required to continue discharging his role.

23. There are elements of unfair termination in this line of thinking. There was no document shown to the Court or the Claimant by the Respondent, setting the mandatory retirement age at 58. No policy document was availed to the Court. It is not enough for an Employer to come to Court and say this is our mandatory retirement age, without proof of the underlying policy document. The claim about the Claimant's physical fitness level was not supported by any medical evidence. The fact that the Claimant had previously had a medical procedure, which Mr. Johnson described as hip replacement, was not shown to result in inability to perform. There was no evidence tabled before the Court on the inability of the Claimant to perform. There was no record of performance appraisal. As suggested in the Claimant's cross-examination of the Respondent's Witness, the Claimant had a big number of unutilized annual leave days, his medical history notwithstanding, indicative of an active, busy-bee Employee, rather than a practiced Idler. Why would an inactive Employee accumulate 72 days of annual leave in a period of 3 years? The allegations that the Claimant was ripe for retirement, and suffered inability to discharge his role, remained just that-mere allegations. The Respondent submitted "we shall not dwell on the fact of the Claimant's health because that was not the ground for his retirement." This would leave the attainment of the mandatory retirement age as the only ground in justifying termination. As discussed above, this residual ground has no evidential support.

24. Section 43 of the Employment Act required the Respondent to prove the reason or reasons for the termination. Where the Employer fails to do so, termination is deemed unfair within the meaning of Section 45 of the Employment Act 2007. The Respondent failed to discharge its obligation under this law. Termination was unfair, and the Claimant is entitled to compensation under Section 49 of the Employment Act 2007. ***He is granted 6 months' salary in compensation for unfair termination at the rate of the monthly gross pay [Kshs. 49,872 x 6] = Kshs. 299,232.***

25. The Claimant has received his annual leave pay, due as of the date of termination. Nothing turns on the evidence on annual leave, except perhaps in underlining how actively the Claimant was engaged in his role, as discussed in paragraph 23 of this Award.

26. Parties shall meet their costs of the Claim.

IN SUM, IT IS ORDERED:-

- a. ***The Respondent did not prove the reason for termination under Section 43 of the Employment Act 2007, and termination was therefore unfair, within the meaning of Section 45 of the Act.***
- b. ***The Respondent shall within 30 days of the delivery of this Award, pay to the Claimant 6 months' gross salary at Kshs. 299,232 in compensation for unfair termination.***
- c. ***Other prayers are declined.***

Dated and delivered at Mombasa this 17th day of July, 2015

James Rika

Judge